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## Inherent Incompatibility Doctrine Circles the Drain in *Knepper v. Rite Aid Corp.*: "Hybrid" Wage & Hour Claims Float in Third Circuit

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INHERENT INCOMPATIBILITY DOCTRINE CIRCLES THE DRAIN IN  
*KNEPPER v. RITE AID CORP.*: “HYBRID” WAGE & HOUR  
CLAIMS FLOAT IN THIRD CIRCUIT

CHAD ODHNER\*

I. INTRODUCTION

The finest distinctions in procedural minutiae can make all the difference in the real world.<sup>1</sup> For example, when a group of employees sues an employer for unpaid wages, the size of the certified group can vary wildly depending on whether the claim is brought under federal or state law.<sup>2</sup> Similarly situated employees cannot join a collective action under the Fair Labor Standards Act (FLSA) unless they affirmatively “opt in.”<sup>3</sup> In contrast, similarly situated employees are automatically joined in class actions brought under most state wage-and-hour laws unless they affirmatively “opt out.”<sup>4</sup>

Federal courts have had some difficulty reconciling these two procedures, especially when FLSA and state law actions are filed at the same time in combined, or “hybrid,” actions in federal court.<sup>5</sup> Courts have disagreed over whether the specified opt-in procedure in the FLSA should bar federal jurisdiction over a corresponding state law claim governed by the opt-out procedure of Federal Rule of Civil Procedure 23 (Rule 23).<sup>6</sup>

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\* J.D. Candidate, 2014, Villanova University School of Law. I would like to thank the staff of the *Villanova Law Review*—in particular Glenn McGillivray and Megan Lagreca—for their tireless effort in bringing this article to publication. I would also like to thank my wife for her constant moral and logistical support during the writing process and throughout our 10 years of marriage.

1. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (acknowledging that procedural rules often significantly affect substantive outcomes).

2. William F. Allen, *Defending Employers in Complex Wage and Hour Litigation*, in STRATEGIES FOR EMPLOYMENT CLASS & COLLECTIVE ACTIONS: LEADING LAWYERS ON ADDRESSING TRENDS IN WAGE AND HOUR ALLEGATIONS AND DEFENDING EMPLOYERS IN CLASS ACTION LITIGATION 71, 83 (2012), available at 2012 WL 5900370 (noting “dramatically opposite” participation rates depending on which classification procedure is employed).

3. For a discussion of the FLSA’s opt-in procedure, see *infra* notes 29–30 and accompanying text.

4. For a discussion of Rule 23’s opt-out procedure, see *infra* notes 31–32 and accompanying text.

5. For a discussion of the dilemma in federal courts, see *infra* notes 33–34 and accompanying text.

6. See, e.g., Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 AM. U. L. REV. 515, 521–30 (2009) (describing split among district courts over inherent incompatibility between federal and state procedures); Daniel C. Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61

In recent years, an argument that these procedures are “inherently incompatible” gained steam in the Third Circuit.<sup>7</sup> Attorneys defending employers have welcomed this doctrine, as group wage-and-hour litigation has become more prevalent in federal practice.<sup>8</sup>

For several years, district courts have employed a disorganized variety of rationales for extending or rejecting supplemental jurisdiction over concurrent state law wage-and-hour claims.<sup>9</sup> The general argument for allowing dual-certification under both the FLSA and Rule 23 is that the FLSA does not expressly prohibit these hybrid actions.<sup>10</sup> Adopting this line of reasoning, several circuit courts have rejected the inherent incompatibility doctrine.<sup>11</sup> In spite of the doctrine’s treatment at the appellate

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HASTINGS L.J. 275, 278 (2009) (surveying district courts’ struggle over inherent incompatibility issue); Todd Schneider & William H. Willson IV, *Concurrent Wage-and-Hour Class and Collective Actions in Federal Court: Courts Around the Country Agree to Disagree*, ANDREWS CLASS ACTION LITIG. REP. (Thomson Reuters West), July 17, 2008, at \*1, available at 2008 WL 2761267 (“[F]ederal courts have struggled with the question of whether the different procedures for state and federal wage-and-hour class actions should prevent a plaintiff from bringing both sets of claims in the same action.”).

7. See *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003) (“[M]andating an opt-in class or an opt-out class is a crucial policy decision . . .”); see also David J. Comeaux & Flynn L. Flesher, “Hybrid” Wage and Hour Class Actions Approved by Third Circuit, OGLETREE DEAKINS (July 31, 2012), <http://www.ogletree-deakins.com/publications/2012-07-31/“hybrid”-wage-and-hour-class-actions-approved-third-circuit> (stating that Third Circuit was most favorable jurisdiction for inherent incompatibility doctrine).

8. See *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 887 (N.D. Iowa 2008) (noting popularity of hybrid wage-and-hour claims among district courts); see also Schneider & Willson, *supra* note 6, at \*1 (“Wage-and-hour class-action litigation is an increasingly prevalent part of federal court dockets throughout the United States.”). See generally Nicholas P. Cholis, *After Ervin: How Combined Actions Will Affect Wage and Hour Class Litigation in Illinois*, 100 ILL. B.J. 430 (2012) (chronicling upward trend in number of wage-and-hour suits in federal courts).

9. See Lopez, *supra* note 6, at 278 (explaining lack of unified rationale in courts’ rejection or acceptance of inherent incompatibility).

10. See *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 974 (7th Cir. 2011) (“Nothing in the text of the FLSA or the procedures established by the statute suggests either that the FLSA was intended generally to oust other ordinary procedures used in federal court or that class actions in particular could not be combined with an FLSA proceeding.”); see also *Lindsay v. Gov’t Emps. Ins. Co.*, 448 F.3d 416, 420–24 (D.D.C. 2006) (holding that FLSA does not prohibit federal jurisdiction over corresponding state wage-and-hour law claims).

11. See *Ervin*, 632 F.3d at 980 (“[T]he ‘conflict’ between the opt-in procedure under the FLSA and the opt-out procedure under Rule 23 is not a proper reason to decline jurisdiction . . .”); *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 247 (2d Cir. 2011) (rejecting argument that inherent incompatibility between opt-in and opt-out procedures constitutes “compelling reason” for declining supplemental federal jurisdiction over state law class action); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761 (9th Cir. 2010) (finding that supplemental jurisdiction over state law class action was within discretion of district court) *vacated on other grounds*, 132 S. Ct. 74 (2011); *Lindsay*, 448 F.3d at 424 (“While there is unquestionably a difference—indeed, an opposite requirement—between opt-in and opt-out procedures, we doubt that a mere *procedural* difference can curtail

level, many district courts continued to have misgivings about combining state law class actions with the FLSA's collective actions.<sup>12</sup>

This article discusses the diminishing viability of the inherent incompatibility doctrine in the context of combined, or hybrid, wage-and-hour group litigation.<sup>13</sup> Part II summarizes the legal background of federal and state wage-and-hour regulations, including an explanation of the procedures applicable in actions brought under federal and state law.<sup>14</sup> Part II also discusses the jurisdictional principles that govern federal courts adjudicating dual-filed wage-and-hour actions.<sup>15</sup> Finally, Part II outlines the development and treatment by courts of the inherent incompatibility doctrine.<sup>16</sup> Part III examines the Third Circuit's opinion in *Knepper v. Rite Aid Corp.*,<sup>17</sup> and analyzes the court's reasoning.<sup>18</sup> Part IV offers suggestions to practitioners in the Third Circuit on how best to take advantage of or mitigate *Knepper's* outcome.<sup>19</sup> Part V provides a brief conclusion.<sup>20</sup>

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section 1367's *jurisdictional sweep*."). *But see De Asencio*, 342 F.3d at 312 (concluding that district court exceeded discretion in granting supplemental jurisdiction over state law class action).

12. *See, e.g., Fisher v. Rite Aid Corp.*, 764 F. Supp. 2d 700, 705 (M.D. Pa. 2011) *aff'd in part, rev'd in part sub nom. Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012) (listing courts that have held Section 216(b) and Rule 23 class actions as inherently incompatible); *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) ("To allow [a] Section 216(b) opt-in action to proceed accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress's intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)'s opt-in requirement."); *see also De La Fuente v. FPM Ipsen Heat Treating, Inc.*, No. 02 C 50188, 2002 WL 31819226 (N.D. Ill. Dec. 16, 2002) (rejecting Rule 23 certification of state law class because of risk of confusion to plaintiffs upon receiving class action notice requiring them to opt in and opt out for same action).

13. For a discussion of the inherent incompatibility doctrine, *see infra* notes 36–38 and accompanying text. Throughout this article I will use the term "hybrid" to refer to the practice of bringing state law class actions and FLSA collective actions that are founded on the same basic employer action in federal court simultaneously.

14. For a further discussion of the procedures governing group wage-and-hour litigation under the FLSA, Rule 23 of the Federal Rules of Civil Procedure, and state law regulations, *see infra* notes 22–35 and accompanying text.

15. For a further discussion of the scope of original and supplemental federal jurisdiction over hybrid wage-and-hour claims, *see infra* notes 36–49 and accompanying text.

16. For a further discussion of the inherent incompatibility doctrine's development in district and circuit courts, *see infra* notes 50–78 and accompanying text.

17. 675 F.3d 249 (3d Cir. 2012).

18. For a further discussion of the Third Circuit's holding and reasoning in *Knepper*, *see infra* notes 76–122 and accompanying text.

19. For a further discussion of *Knepper's* impact on Third Circuit practitioners, *see infra* notes 123–32 and accompanying text.

20. For a further discussion of the demise of inherent incompatibility doctrine, *see infra* 130–34 and accompanying text.

## II. BACKGROUND: FEDERAL AND STATE WAGE-AND-HOUR LAW

In 1938, Congress passed the FLSA, following a change in the Supreme Court's posture toward federal wage-and-hour regulation.<sup>21</sup> The FLSA's minimum wage and overtime requirements established a regulatory floor for labor conditions to achieve a minimum living standard.<sup>22</sup> The statute's savings clause empowered states to set equivalent or more stringent wage-and-hour regulations.<sup>23</sup> Accordingly, most states enacted wage-and-hour regimes, many of which create substantive rights that mirror the FLSA.<sup>24</sup>

21. See Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2006) (codifying federal minimum wage and overtime regulations); see also Lopez, *supra* note 6, at 279–80 (summarizing political history of federal and state wage-and-hour regulation). The Supreme Court initially resisted New Deal legislation that regulated employee wages and hours, either on due process grounds or as violative of the Commerce Clause. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936) (holding that state wage fixing legislation is “repugnant” to due process right to freedom of contract); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (finding that fixing wages and hours of employees in intra-state business exceeded constitutional federal power under Commerce Clause). President Roosevelt and other wage law proponents responded by pushing for a constitutional amendment to address low wages and poor working conditions, and by introducing legislation to stack the Supreme Court with pro-New Deal judges. See Lopez, *supra* note 6, at 279–80 (summarizing Democratic Party alliance with labor unions to overcome opposition to labor regulation). In what became the “switch in time that saved nine,” the Court ultimately acquiesced to wage regulation. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393–94 (1937) (upholding Washington's state minimum wage). See generally BURT SOLOMON, *FDR v. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* (1st ed. 2009) (discussing Franklin Delano Roosevelt's court-packing plan and Justice Owen Roberts's sudden and timely jurisprudential “switch”).

22. See 29 U.S.C. § 202 (addressing labor conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers”); *id.* § 206 (mandating federal minimum wage); *id.* § 207 (mandating time-and-a-half pay for hours worked in excess forty-hour work week); see also Lopez, *supra* note 6, at 280–81 (describing regulatory floor-setting policy behind FLSA). See generally John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L. & CONTEMP. PROBS. 464 (1939) (discussing FLSA's development and policy objectives).

23. See 29 U.S.C. § 218 (“No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter . . .”); see also *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir. 1991) (noting that “every Circuit that has considered the issue” has concluded that FLSA does not preempt state wage law). But see Alexander, *supra* note 6, at 549–58 (arguing that hybrid state claims should be dismissed on theory that Rule 23 procedure erects “obstacle” in front of purposes and objectives of Congress as expressed in FLSA).

24. See *Schneider & Willson*, *supra* note 6, at \*1 (identifying forty-eight states, as well as Puerto Rico and District of Columbia, as jurisdictions with wage-and-hour regimes). Although most state wage-and-hour regimes mirror the FLSA, some states have gone beyond the FLSA by setting a higher minimum wage or imposing harsher penalties for employer violations. See Allen, *supra* note 2, at \*2 (noting treble damages imposed by some state regimes).

A. *To Opt In or to Opt Out? That is the Question*

The FLSA created a private cause of action for employees to recover unpaid wages due under the statute.<sup>25</sup> Originally, such actions could be pursued (1) individually, (2) collectively by an employee “on behalf of other employees similarly situated,” or (3) by a non-party representative designated by a group of similarly situated employees.<sup>26</sup> In 1947, Congress eliminated representative action by passing the Portal-to-Portal Act.<sup>27</sup> In passing the law, Congress addressed a perceived increase in wage litigation initiated by union leaders with no direct stake in the claims, which some believed created impermissible impediments to economic activity.<sup>28</sup> Under the amended FLSA Section 216(b), only aggrieved employees can represent a class, and any employee wishing to join a FLSA action must affirmatively opt in.<sup>29</sup>

The FLSA’s opt-in requirement stands in sharp contrast to the opt-out mechanism applicable to most class actions under Rule 23.<sup>30</sup> Under Rule

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25. See Lopez, *supra* note 6, at 281 (describing procedural provisions of FLSA as originally passed).

26. See James M. Fraser, Note, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be “Similarly Situated”?*, 38 SUFFOLK U. L. REV. 95, 99 (2004) (outlining private action procedures available in original FLSA).

27. See Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (1947) (codified as amended in scattered sections of 29 U.S.C.); see also Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989) (“The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions.”). The Act also narrowed employer liability for “portal pay,” or pay allegedly due employees for time spent traveling on site to and from their workstations. See Fraser, *supra* note 26, at 101 (discussing wave of anti-FLSA political activity leading to eventual passage of Portal-to-Portal Act).

28. See Fraser, *supra* note 26, at 101 (explaining historical context of FLSA reforms); see also Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 54 (1991) (describing intense political debate over scope of FLSA as “one of the greatest legal-economic controversies in American history . . .”).

29. See 29 U.S.C. § 216(b) (2006) (creating opt-in requirement for FLSA collective actions). The term “opt-in” is not used in the statute:

An action to recover [under Sections 206 and 207] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.*

*Id.* (emphasis added).

30. Compare *id.* (requiring potential litigants to file consent with court to join FLSA claims), with FED. R. CIV. P. 23(b)(3) (binding all class members who have not filed affirmative request for exclusion from judgment). The FLSA’s opt-in procedure for collective actions also applies to federal age and gender pay discrimination collective actions. See Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56–57 (1963) (codified as amended at 29 U.S.C. § 206(d)) (prohibiting wage discrimination based on gender and incorporating FLSA opt-in procedure into private cause of action); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7, 81 Stat. 604, 604–05 (codified as amended at 29 U.S.C. § 626(b))

23, members of a court-certified class are bound as parties to the action unless they actively opt out by filing for exclusion.<sup>31</sup> One of Rule 23's requirements for classification is that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."<sup>32</sup>

Importantly, very few state wage law regimes foreclose opt-out class actions under Rule 23, assuming federal jurisdiction exists.<sup>33</sup> On the other hand, courts have consistently ruled that the clear conflict between these two procedures forecloses use of a Rule 23 opt-out class action to enforce rights created under the FLSA.<sup>34</sup> The question remains as to whether federal courts may enforce state law wage-and-hour class actions under Rule 23 while concurrently enforcing FLSA collective actions under the Section 216(b) scheme.<sup>35</sup>

### B. *Hybrid State and Federal Actions: A Question of Jurisdiction*

Importantly, the difference between the opt-in procedure under Section 216(b) and the opt-out procedure under Rule 23 leads to a significant discrepancy in the number of plaintiffs in a FLSA collective action versus a

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(prohibiting wage discrimination based on age and incorporating FLSA opt-in procedures); *see also* Lopez, *supra* note 6, at 275 (characterizing FLSA's opt-in procedure as "antiquated vestige" from "infancy of group litigation").

31. *See* FED. R. CIV. P. 23(c)(3) (binding any certified class members "who have not requested exclusion, and whom the court finds to be class members"). Interestingly, prior to a 1966 revision, Rule 23 employed an opt-in procedure essentially equivalent to the FLSA Section 216(b) procedure. *See* Andrew C. Brunsdon, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 279–81 (2008) (discussing developmental interplay between Rule 23 and FLSA Section 216(b) group litigation procedures).

32. FED. R. CIV. P. 23(b)(3) (considering "likely difficulties in managing a class action").

33. *See* Schneider & Willson, *supra* note 6, at \*1 (surveying state wage-and-hour regulations and noting that only four jurisdictions require opt-in procedures akin to FLSA's collective action opt-in procedure). Accordingly, most state law wage-and-hour claims are pursued as class actions. *See id.* (explaining that employees that fit definition in state wage law class action complaint are considered members of class unless they opt out). Because the FLSA only applies to companies making over half a million dollars or engaging in interstate commerce, some states' wage-and-hour regulations expressly extend only to intrastate employers not covered under FLSA. *See id.* (exploring unique state law wage-and-hour schemes); *see also* 29 U.S.C. § 203 (2006) (describing scope of federal wage-and-hour regulations).

34. *See, e.g.,* Knepper v. Rite Aid Corp., 675 F.3d 249, 257 (3d Cir. 2012) ("Courts have concluded that the plain language of this provision bars opt-out class actions . . . under the well-established principle that, where Congress has provided a detailed remedy, other remedies are unavailable."); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975) (noting "fundamental, irreconcilable difference" between opt-out procedure in Rule 23 class actions and opt-in procedure in FLSA Section 216(b) collective actions).

35. *See* De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 312 (3d Cir. 2003) (holding that in certain cases opt-out procedure may be inherently incompatible with opt-in procedure).

state law class action.<sup>36</sup> Courts have sometimes agreed with litigants that proceeding in the face of this discrepancy presents an inherent jurisdictional problem.<sup>37</sup> Whether or not to allow both claims to proceed in federal court is ultimately a question of when and how far federal courts' jurisdiction over state law claims can and should extend.<sup>38</sup> There are two potential sources of federal jurisdiction over state wage-and-hour claims: supplemental jurisdiction under Title 28, Section 1367 of the United States Code and original jurisdiction stemming from the Class Action Fairness Act (CAFA).<sup>39</sup>

### 1. *Supplemental Jurisdiction Under Section 1367*

Federal courts have original federal question jurisdiction over FLSA actions regardless of their collective or individual status.<sup>40</sup> In addition, courts may exercise supplemental jurisdiction over state law claims that "form part of the same case or controversy" as the federal claim to which the court's original jurisdiction extends.<sup>41</sup> Because most state wage-and-hour regulations are substantively similar or identical to the FLSA, state

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36. See *id.* (holding that inordinate size of state law class contributes to substantial predomination over federal law claim); see also Brunsden, *supra* note 31, at 291–94 (estimating that only about fifteen percent of potential FLSA plaintiffs opt in to collective federal actions, while about one percent of certified class members in state law class actions governed by Rule 23 opt out of such actions); Les A. Schneider & J. Larry Stine, *Hybrid Action, Collective Actions, and Class Actions*, WAGE & HOUR L.: COMPLIANCE & PRACTICE (Thomson Reuters West), 2013 (discussing disparity between number of opt-in plaintiffs and opt-out plaintiffs typical of hybrid actions).

37. See *Knepper v. Rite Aid Corp.*, 764 F. Supp. 2d 707, 713 (M.D. Pa. 2011) (explaining that inherent incompatibility doctrine extends even to cases filed under CAFA) *aff'd in part, rev'd in part*, 675 F.3d 249 (3d Cir. 2012). But see *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 980 (7th Cir. 2011) ("[W]hile there may in some cases be exceptional circumstances or compelling reasons for declining jurisdiction, the 'conflict' between the opt-in procedure under the FLSA and the opt-out procedure under Rule 23 is not a proper reason to decline jurisdiction under section 1367(c)(4).").

38. For a discussion of the *Knepper* court's rejection of non-jurisdictional arguments, see *infra* notes 109–12 and accompanying text. For a discussion of the *Knepper* court's rejection of the Rules Enabling Act challenge, see *infra* notes 113–14 and accompanying text.

39. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.); see also Brunsden, *supra* note 31, at 284 ("Jurisdictional issues in hybrid class actions will continue to be addressed under both CAFA and supplemental jurisdiction.").

40. See U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."); 28 U.S.C. § 1331 (2006) (granting federal courts federal question jurisdiction authorized by Article III); see also *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (noting that federal courts have "federal question" jurisdiction at least over causes of action created by federal statute).

41. See 28 U.S.C. § 1367(a) (outlining rules for supplemental federal jurisdiction over state law claims). For claims to form part of the same case or controversy, they must "derive from a common nucleus of operative fact." See *United Mine*



claims usually rest on the same nucleus of facts as corresponding FLSA claims.<sup>42</sup>

But federal courts retain discretion to decline supplemental jurisdiction where, for example, a claim raises “novel or complex” state law issues, or where the state law claim “substantially predominates over” the federal claim that supported original jurisdiction.<sup>43</sup> Federal courts may also decline supplemental jurisdiction if, “in exceptional circumstances, there are other compelling reasons . . . .”<sup>44</sup> Where jurisdiction over state law claims is merely supplemental, some federal courts have claimed discretion to dismiss the state class actions.<sup>45</sup>

## 2. *Original Jurisdiction Under CAFA*

Under the CAFA, federal jurisdiction is not merely supplemental.<sup>46</sup> Instead, the CAFA relaxes the rules for federal diversity jurisdiction for large class action suits.<sup>47</sup> Thus, the statute also grants original federal jurisdiction over many state law wage-and-hour class action suits.<sup>48</sup> Import-

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Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (finding discretionary supplemental jurisdiction of federal courts over some state law claims).

42. For a discussion of similarities between rights created under state and federal wage-and-hour laws, see *supra* note 24 and accompanying text.

43. 28 U.S.C. § 1367(c)(1), (2) (expressly granting federal courts discretion to decline supplemental jurisdiction under limited conditions); see also *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 312 (3d Cir. 2003) (dismissing state wage-and-hour class action because it would substantially predominate over FLSA claim); *Gibbs*, 383 U.S. at 726 (“[The] justification [for supplemental jurisdiction] lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . . .”).

44. 28 U.S.C. § 1367(c)(4).

45. For a discussion of *De Asencio* and the extent of courts’ discretion to reject supplemental jurisdiction, see *infra* notes 53–55 and accompanying text.

46. For a discussion of federal jurisdiction in large class action suits under the CAFA, see *infra* notes 46–49 and accompanying text.

47. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.) (amending diversity requirements for class actions). For example, the CAFA significantly expanded federal jurisdiction over class actions, primarily by replacing the “complete diversity” requirement with a “minimal diversity” requirement, which only entails diversity between any plaintiff and any defendant. See 28 U.S.C. § 1332(d)(2) (setting minimal diversity requirement for diversity jurisdiction over class actions). The CAFA also replaced the usual non-aggregated \$75,000 minimum amount in controversy requirement with a \$5,000,000 requirement that may be aggregated. See *id.* § 1332(d)(6) (allowing aggregation for purposes of calculating amount in controversy).

48. See Jason R. Bristol, Thomas A. Downie & Ashley A. Weaver, *Intended and Unintended Consequences: The 2006 Fair Minimum Wage Amendment of the Ohio Constitution*, 58 CLEV. ST. L. REV. 367, 375 (2010) (discussing impact of CAFA on jurisdiction over wage-and-hour actions). To satisfy the CAFA’s relaxed diversity rules, only one plaintiff must be from a different state than the employer being sued. See Brunsden, *supra* note 31, at 283 (discussing CAFA’s expansion of federal jurisdiction over interstate class actions).

tantly, where diversity jurisdiction exists under the CAFA, federal courts cannot dismiss state class actions based on the discretionary supplemental jurisdiction theory outlined above.<sup>49</sup>

### C. Courts Grapple with Hybrid Actions and Inherent Incompatibility

The Third Circuit became the first circuit court to grapple with the supplemental jurisdiction question in *De Asencio v. Tyson Foods, Inc.*<sup>50</sup> In *De Asencio*, hourly employees at a chicken processing plant gained collective treatment in an FLSA suit, and only filed for class certification under Rule 23 after the fact under a unique Pennsylvania contract law theory.<sup>51</sup> The district court ultimately granted Rule 23 certification for the state law claims and the defendant plant-owner disputed jurisdiction on interlocutory appeal.<sup>52</sup>

The Third Circuit held that the state law claim substantially predominated over the FLSA claim for two reasons.<sup>53</sup> First, the presence of complex and unique state law questions militated against supplemental jurisdiction.<sup>54</sup> Additionally, the court held that the “sheer difference in numbers” between the Rule 23 opt-out class and the FLSA opt-in class might constitute substantial predomination.<sup>55</sup> Moreover, although framed as a jurisdictional issue, the court clearly placed a heavy emphasis on the policy behind Congress’s decision to require an opt-in procedure for FLSA claims.<sup>56</sup>

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49. For a discussion of supplemental jurisdiction and discretion to decline jurisdiction under Section 1367, see *supra* notes 40–45.

50. 342 F.3d 301 (3d Cir. 2003). The Third Circuit held that the district court exceeded its discretion under 28 U.S.C. 1367(c)(1) by extending supplemental jurisdiction to the Pennsylvania wage law class action. See *id.* at 307–12 (concluding that district court exceeded its discretion).

51. See *id.* at 305 (describing employees’ uncompensated time spent donning and doffing protective clothing to prevent disease associated with handling of chicken slaughtering refuse). At the time *De Asencio* was being decided, the Supreme Court of Pennsylvania had not yet ruled on the state law theory. See *id.* at 309 (discussing unique implied oral contract theory for establishing employment under Pennsylvania law).

52. See *id.* at 305 (discussing procedural posture of case).

53. See *id.* at 308–09 (discussing statutory limits of federal supplemental jurisdiction under Section 1367 and scope of federal court discretion in determining substantial predomination).

54. See *id.* at 309 (“[A] district court will find substantial predomination ‘where a state claim constitutes the real body of the case, to which the federal claim is only an appendage’ . . . .” (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 727 (1966))).

55. See *id.* at 311 (“Predomination under section 1367 generally goes to the type of claim, not the number of parties involved. But the disparity in numbers of similarly situated plaintiffs may be so great that it becomes dispositive by transforming the action to a substantial degree, by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog.”) (emphasis added).

56. See *id.* (“[I]t is sufficient to note that mandating an opt-in class or an opt-out class is a crucial policy decision. Congress has selected an opt-in class for FLSA

D. *Other Circuit Courts Respond to Inherent Incompatibility*

In *Lindsay v. Government Employees Insurance Co.*,<sup>57</sup> the District of Columbia Circuit Court rejected a jurisdictional argument similar to the one posed in *De Asencio*.<sup>58</sup> Importantly, *Lindsay* did not involve either the complex state law issues or the large disparity in Rule 23 and FLSA class sizes present in *De Asencio*.<sup>59</sup> Nonetheless, *Lindsay* stands for the proposition that any conflict inherent in the two procedures is overcome by Congress's clear policy interest in expansive supplemental jurisdiction.<sup>60</sup>

In the more recent case of *Ervin v. OS Restaurant Services, Inc.*,<sup>61</sup> the Seventh Circuit took on *De Asencio* directly, distinguishing it on the basis of the unique state law issues presented there.<sup>62</sup> The *Ervin* court also called into question *De Asencio*'s suggestion that disparity in numbers alone might constitute substantial predomination.<sup>63</sup> The court reasoned that Section

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actions.”). Nonetheless, it is not entirely clear what the controlling factor in the case was. Compare *id.* (stating that diversity in class sizes may be dispositive), with *id.* (stating that disparity in class sizes may not be dispositive), and *id.* (stating that dual-classification may be “proper” where federal and state actions raise similar issues and proof requirements).

57. 448 F.3d 416 (D.C. Cir. 2006).

58. See *id.* at 424 (limiting court discretion to dismiss state law claims on substantial predomination theory).

59. See *id.* at 424–25 (holding that differences between opt-in and opt-out procedures did not constitute “exceptional circumstances” justifying discretionary rejection of supplemental jurisdiction under Section 1367(c)). The court did not directly distinguish *De Asencio*, which came down the same year, but the state law issues in *Lindsay* were nearly identical to the FLSA issues and the FLSA claim achieved an unusually high opt-in rate. See *id.* at 425 n.12 (rejecting substantial predomination argument).

60. See *id.* at 424 (“While there is unquestionably a difference—indeed, an opposite requirement—between opt-in and opt-out procedures, we doubt that a mere *procedural* difference can curtail section 1367’s *jurisdictional* sweep. Regardless of any policy decision implicit in [FLSA]’s opt-in requirement . . . Congress made its intent regarding the exercise of supplemental jurisdiction clear: ‘Congress conferred a broad grant of jurisdiction upon the district courts, indicating a congressional desire that, supplemental jurisdiction at least in the first instance . . . go to the constitutional limit . . . .’”) (citation omitted).

61. 632 F.3d 971 (7th Cir. 2011).

62. See *id.* at 980 (noting that plaintiffs’ Illinois Wage Payment and Collection Act claims “essentially replicate” their FLSA claims).

63. See *id.* (“As long as the claims are similar between the state plaintiffs and the federal action, it makes no real difference whether the numbers vary.”). Although the disparity in class sizes in *Ervin* was greater than *Lindsay*, it was not as vast as the disparity in *De Asencio*: the disparity in *Lindsay* was a narrow 204 FLSA claimants and 228 state law claimants. See *id.* (comparing disparity of class sizes in *Lindsay*, *Ervin*, and *De Asencio*). In *Ervin*, the FLSA action garnered thirty opt-in claimants and the Rule 23 action would have achieved between 180 and 250 claimants. See *id.* (same). In *De Asencio*, the disparity was far more severe with only 447 FLSA claimants compared to a Rule 23 class of 4,100 claimants. See *id.* at 981 (same).

1367's efficiency policy would not be served by requiring two separate trials on the same facts simply because the class sizes were different.<sup>64</sup>

The *Ervin* court also rejected the district court's inherent incompatibility holding.<sup>65</sup> According to the district court, Rule 23's opt-out procedure undermined the congressional intent behind the FLSA's opt-in procedure, rendering Rule 23 actions categorically incompatible when combined with FLSA actions in federal court.<sup>66</sup> The Ninth Circuit acknowledged the procedural tension but held that the FLSA's language provides no textual justification for dismissing state law claims.<sup>67</sup>

#### E. *Inherent Incompatibility Arguments in District Courts After Ervin*

After *Ervin*, it was unclear whether inherent incompatibility would go any further, at least on the Section 1367 supplemental jurisdiction argument.<sup>68</sup> But some courts continued to dismiss hybrid actions on jurisdictional grounds, embracing the inherent incompatibility argument in several different iterations.<sup>69</sup> The most common argument—rejected in the circuit court decisions discussed above—continues to be that massive state law class actions will tend to “predominate” over corresponding federal claims for purposes of Section 1367 supplemental jurisdiction.<sup>70</sup> Importantly, the passage of the CAFA may render this line of cases moot.<sup>71</sup>

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64. See *id.* at 981 (speculating that requiring separate litigation on same facts would undermine efficiency policy in most cases). The court did not entirely foreclose the possibility that *De Asencio's* reasoning might apply in exceptional cases. See *id.* at 980 (declining to take position on “whether a state law class might ever so dwarf a federal FLSA action that supplemental jurisdiction becomes too thin a reed on which to ferry the state claims into federal court”).

65. See *id.* at 974 (“[T]here is no insurmountable tension between the FLSA and Rule 23(b)(3).”).

66. See *Ervin v. OS Rest. Servs., Inc.*, No. 08 C 1091, 2009 WL 1904544, at \*2 (N.D. Ill. July 1, 2009) (“[T]here is a clear incompatibility between the ‘opt out’ nature of a Rule 23 action and the ‘opt in’ nature of a Section 216 action.”).

67. See *Ervin*, 632 F.3d at 977 (“[T]he court jumped too quickly to congressional intent. Before taking that step, we must examine the text of the FLSA itself.”).

68. See Cholis, *supra* note 8, at 432–33 (discussing impact of *Ervin* on Illinois district courts’ handling of hybrid wage-and-hour actions).

69. See Schneider & Willson, *supra* note 6, at \*2 (“No definitive line of cases has emerged, and the sheer volume of cases addressing this subject makes it impossible to put them into a finite number of categories.”).

70. For a discussion of supplemental jurisdiction under Section 1367, see *supra* notes 40–45 and accompanying text; see also *McClain v. Leona’s Pizzeria, Inc.*, 222 F.R.D. 574, 577 (N.D. Ill. 2004) (holding that Section 1367’s grant of supplemental jurisdiction “does not contemplate a plaintiff using supplemental jurisdiction as a rake to drag as many members as possible into what would otherwise be a federal collective action.”).

71. For a discussion of the CAFA’s jurisdictional sweep and underlying policy objectives, see *supra* notes 46–49 and accompanying text. For a further discussion of the CAFA’s impact on hybrid wage claims, see *supra* notes 46–49 and accompanying text.

Another argument against hybrid actions is that the plaintiff notification process would be too confusing to potential participants and would create manageability issues when Rule 23 and FLSA notifications are simultaneously employed.<sup>72</sup> However, courts rejecting inherent incompatibility have made precisely the opposite argument: forcing litigation of identical factual and nearly identical legal issues in two separate forums creates needless inefficiency.<sup>73</sup>

A few courts have embraced the inherent incompatibility doctrine in its purest form, arguing that Rule 23's opt-out default simply strays too far from Congress's clear intent in creating the FLSA's opt-in procedure for wage-and-hour actions.<sup>74</sup> One district court in Pennsylvania has accepted the inherent incompatibility theory—including in cases on appeal in *Knepper* below—so it seemed possible that the Third Circuit might be ripe ground for a circuit split.<sup>75</sup>

### III. *KNEPPER V. RITE AID CORP.*

In *Knepper* the Third Circuit became the fifth court of appeals to reject the inherent incompatibility argument against hybrid claims.<sup>76</sup> Specifically, the Middle District of Pennsylvania embraced inherent incompatibility where independent federal jurisdiction existed over the state law claims under the CAFA, and where the state law claims were filed separately from the FLSA claims.<sup>77</sup> But the Third Circuit's rejection of the doctrine in this context likely applies more broadly, as it addressed the heart of the legislative intent argument that forms the basis for inherent incompatibility.<sup>78</sup>

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72. See Lopez, *supra* note 6, at 286 (discussing Rule 23 notification requirements).

73. See Fraser, *supra* note 26, at 102–05 (discussing efficiency considerations behind modern Rule 23).

74. For a discussion of courts that have declined jurisdiction over state law class actions solely because of a conflict between Rule 23 and FLSA, see *supra* note 12 and accompanying text.

75. See, e.g., Fisher v. Rite Aid Corp., 764 F. Supp. 2d 700, 705 (M.D. Pa. 2011) (rejecting jurisdiction over state law claims based on conflict between Rule 23 and FLSA Section 216(b)), *aff'd in part, rev'd in part sub nom.* Knepper v. Rite Aid Corp., 675 F.3d 249 (3d Cir. 2012); Otto v. Pocono Health Sys., 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) (concluding that application of Rule 23 and FLSA Section 216(b) concurrently would “nullify” Congress's intent).

76. For a discussion of appellate court treatment of the inherent incompatibility doctrine, see *supra* notes 56–67 and accompanying text.

77. For a list of courts that have declined jurisdiction over state law class actions solely because of a conflict between Rule 23 and FLSA, see *supra* note 12 and accompanying text.

78. For a summary of the Third Circuit's policy analysis in *Knepper*, see *infra* notes 97–102 and accompanying text.

A. *Factual and Procedural Background*

James Fisher and Robert Vasvari, both former assistant Rite Aid store managers, were opt-in plaintiffs in a nationwide FLSA collective action against Rite Aid for unpaid overtime wages.<sup>79</sup> Plaintiffs claimed that Rite Aid misclassified assistant store managers as exempt from the FLSA's overtime requirements under Section 207.<sup>80</sup> Shortly after joining the FLSA claim, Fisher and Vasvari independently initiated Rule 23 class action claims against Rite Aid based on state law theories very similar to the FLSA claim, and sought compensation for unpaid overtime under Maryland and Ohio law respectively.<sup>81</sup> Both claims made their way to the Middle District of Pennsylvania, where the FLSA collective claim was being litigated.<sup>82</sup>

The district court agreed with Rite Aid that Rule 23's opt-in procedure is inherently incompatible with the FLSA's opt-out scheme because it

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79. See *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 252 (3d Cir. 2012) (reciting procedural background); see also *Craig v. Rite Aid Corp.*, Civil Action No. 4:08-CV-2317, 2011 WL 3652175, at \*1 (M.D. Pa. Aug. 18, 2011), *report and recommendation adopted*, No. 08-CV-2317, 2011 WL 3651360 (M.D. Pa. Aug. 18, 2011) (recognizing as similarly situated for purposes of collective action under FLSA "[a]ll individuals classified as exempt from the FLSA's overtime pay provisions and employed as salaried Assistant Store Managers during any workweek within the previous three years in any of the 4,901 [Rite Aid] stores . . .").

80. See *Knepper*, 675 F.3d at 252 (explaining overtime claim under FLSA Section 207). Section 207's overtime requirement requires time-and-a-half pay for hours worked beyond forty weekly hours:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a) (1) (2006) (requiring time-and-a-half for hours worked in excess of forty hours per week).

81. See *Knepper*, 675 F.3d at 252–53 (tracing procedural origins of hybrid claim); see also *Fisher v. Rite Aid Corp.*, 764 F. Supp. 2d 700 (M.D. Pa. 2011), *aff'd in part, rev'd in part sub nom.* *Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012); *Knepper v. Rite Aid Corp.*, 764 F. Supp. 2d 707 (M.D. Pa. 2011), *aff'd in part, rev'd in part*, 675 F.3d 249 (3d Cir. 2012).

82. See *Knepper*, 675 F.3d at 252 (explaining transfer and re-filing procedures). Citing judicial efficiency principles, the District of Maryland dismissed Fisher's class action claim without prejudice and Fisher re-filed with the Middle District of Pennsylvania. See *Fisher v. Rite Aid Corp.*, Civil Action No. RDB-09-1909, 2010 WL 2332101, at \*2 (D. Md. June 8, 2010) (explaining first-to-file rule and granting defendant's motion to dismiss). Fisher successfully re-filed in the Middle District of Pennsylvania based on diversity jurisdiction. See *Knepper*, 675 F.3d at 252 (explaining Fisher's re-filing in Middle District of Pennsylvania). The Northern District of Ohio transferred Vasvari's claim to the Middle District of Pennsylvania because of a transfer clause in his employment contract with Rite Aid. See *id.* at 253 (providing reason for transferring Vasvari's claim). The Middle District of Pennsylvania then substituted Daniel Knepper as the plaintiff in Vasvari's claim after Vasvari died. See *id.* at 252 (explaining that claim did not otherwise change in any respect).

undermines Congress's intent to limit the volume of wage-and-hour litigation, as well as preventing plaintiffs' rights from being litigated without their knowledge.<sup>83</sup> Interestingly, although inherent incompatibility has generally been invoked only in hybrid actions, the district court held that the doctrine bars federal courts from processing parallel state law wage-and-hour claims under any circumstance.<sup>84</sup> Specifically, the court held that separately filed FLSA and state law wage-and-hour actions conflict with the policy underlying both Section 216(b)'s opt-in requirement, as well as that underlying hybrid actions.<sup>85</sup> On the other hand, noting that Congress only intended the FLSA to set a regulatory floor, the district court succinctly rejected Rite Aid's argument that federal labor standards preempted any similar rights created by state law.<sup>86</sup> Thus, the district court's dismissal would not prevent plaintiffs from re-filing their state law claims in state court.<sup>87</sup>

### B. *Third Circuit Rejects Inherent Incompatibility*

The Court of Appeals for the Third Circuit began its analysis by providing a detailed history of the opt-in procedure and its incorporation into the FLSA through the Portal-to-Portal Act.<sup>88</sup> In particular, the court highlighted Congress's concern that early FLSA litigation had created immense, unpredictable, and retroactive employer liability.<sup>89</sup> According to the court, in this regard Congress was primarily targeting so-called "repre-

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83. See *id.* at 253 (summarizing district court holding). The Middle District of Pennsylvania pointed to its own previous findings on the inherent incompatibility argument, as well as precedent from other district courts accepting inherent incompatibility. See, e.g., *Fisher*, 764 F. Supp. 2d at 705 (providing cases supporting inherent incompatibility doctrine); *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) ("To allow an [sic] Section 216(b) opt-in action to proceed accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress's intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)'s opt-in requirement.").

84. See *Fisher*, 764 F. Supp. 2d at 706 (extending inherent incompatibility doctrine to separately filed FLSA and state wage-and-hour claims).

85. See *id.* ("[D]enying a plaintiff the opportunity to litigate a claim in one action, but allowing the claim to proceed in an action that only differs from the original by docket number, does not vindicate the purposes behind application of the doctrine in the first place.").

86. See *Knepper v. Rite Aid Corp.*, 764 F. Supp. 2d 707, 712 (M.D. Pa. 2011), *aff'd in part, rev'd in part*, 675 F.3d 249 (3d Cir. 2012) (noting that presence of "savings clause" in FLSA constitutes clear evidence that "states are free to enact relevant laws that are more protective than the scope of the FLSA.").

87. See *Fisher*, 764 F. Supp. 2d at 707 (dismissing state law claim without prejudice and holding that plaintiff had no basis for relief in federal court on state law claim).

88. See *Knepper*, 675 F.3d at 253 (acknowledging dispute over purpose of 1947 amendment "and its implications for federal opt-out class actions based on state law").

89. See *id.* at 255 (discussing congressional intent behind Portal-to-Portal Act's amendments to Section 216(b) of FLSA).

sentative” actions, allegedly initiated by non-employee union leaders as a bargaining strategy.<sup>90</sup>

A secondary legislative concern, according to the court, was the prospect of one-way intervention, whereby large numbers of passive employees might choose to sit out of FLSA litigation initially, opting to be bound by the judgment once it became clear that the outcome would be in their favor.<sup>91</sup> The court also noted that the conflict between opt-in and opt-out procedures only became relevant when Rule 23 was revised to its current opt-out form.<sup>92</sup>

The Third Circuit next acknowledged the agreement among courts that the opt-in requirement in Section 216(b) clearly precludes use of a Rule 23 opt-out class action to enforce FLSA violations themselves.<sup>93</sup> As the court explained, the inherent incompatibility argument essentially extends this logic to state law wage-and-hour claims filed in federal court.<sup>94</sup> But, following the Seventh Circuit’s lead in *Ervin*, the Third Circuit found no evidence that the text of Section 216(b) or Congress’s intent indicated any unacceptable conflict between the two procedures.<sup>95</sup>

Undergoing a textual analysis of Section 216(b), the Third Circuit determined that, on its face, the statute only requires application of the opt-in mechanism to actions initiated under Sections 206, 207, or 215(a)(3) of the FLSA, which (respectively) cover minimum wage, overtime pay, and employer retaliation against employees who file FLSA actions.<sup>96</sup> Specifically, the court flatly disagreed with the district court’s

90. *See id.* at 256 (distilling Portal-to-Portal Act’s legislative history); *see also* *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 446–47 (W.D. Pa. 2007) (providing detailed account of Portal-to-Portal Act’s legislative history).

91. *See Knepper*, 675 F.3d at 255–57 (identifying legislative purpose for filed consent requirement in 1947 amendment). The court also noted Congress’s concern that Section 216(b) claims might be used by derelict plaintiffs to circumvent the statute of limitations. *See id.* (clarifying Congress’s intent that collective FLSA actions not prevent running of statute of limitations for plaintiffs who only join action after statute of limitation has run).

92. *See id.* at 257 (discussing effect of Rule 23’s 1966 revision on FLSA claims).

93. *See id.* (“[W]here Congress has provided a detailed remedy, other remedies are unavailable.”). The same logic applies to other federal causes of action that incorporate FLSA’s opt-in mechanism. *See, e.g.,* *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975) (holding Age Discrimination in Employment Act’s express adoption of FLSA opt-in mechanism to be irreconcilable with invocation of Rule 23 for purpose of circumventing Section 216(b)’s consent requirement).

94. *See Knepper*, 675 F.3d at 258 (examining reasoning, context, and development of inherent incompatibility doctrine). In *Knepper* the district court extended the same logic even as far as state law wage-and-hour class action claims filed in federal court independent of a related FLSA collective action. *See id.* (explaining district court’s application of inherent incompatibility doctrine).

95. *See id.* at 258–59 (identifying *Ervin* as “[t]he most thorough examination” of inherent incompatibility argument).

96. *See id.* (examining text of Section 216(b)). Indeed, Section 216(b) states, “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing . . . .” 29 U.S.C. § 216(b) (2006) (emphasis added). It is clear from



finding that the scope of Section 216(b) was ambiguous on the issue of whether it applied to causes of action originating in state law.<sup>97</sup> Furthermore, the court noted that Section 216(b) makes no mention of state law causes of action, and the FLSA includes an express savings clause preserving state regulatory regimes from federal preemption.<sup>98</sup>

The Third Circuit also disapproved of the trial court's emphasis on perceived congressional intent without any "clear textual or doctrinal basis."<sup>99</sup> More importantly, the Third Circuit disagreed with the trial court that Congress's primary intent in passing the Portal-to-Portal Act amendments to Section 216(b) was to ensure that "absent individuals would not have their rights litigated without their input or knowledge."<sup>100</sup> Instead, in the court's view, Congress's primary purpose was to prevent union representatives from "manufactur[ing] litigation in which they had no personal stake," and to prevent "one-way intervention by plaintiffs who would not be bound by an adverse judgment."<sup>101</sup>

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the context that "any such action" refers narrowly to "[a]n action to recover the liability prescribed in either of the preceding sentences," which only includes employer violations of "the provisions of section 206 or section 207 . . . . [Or] the provisions of section 215(a)(3) . . . ." *Id.*

97. See *Knepper*, 675 F.3d at 259 (finding that explicit limitation to actions under FLSA and absence of mention of state law causes of action does not constitute ambiguity). In a footnote, the court also highlighted a clear statement in the Portal-to-Portal Act's legislative history indicating that the opt-in requirement "shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938." *Id.* at 260 n.14 (quotation and citation omitted).

98. See *id.* at 258–59 (summarizing Seventh Circuit's inquiry into statutory ambiguity).

99. See *id.* at 259–60 (citing principle that extrinsic materials only appropriate in statutory interpretation where text is otherwise ambiguous). The Third Circuit echoed the Seventh Circuit in this regard. See *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 977 (7th Cir. 2011) ("[T]he court jumped too quickly to congressional intent. Before taking that step, we must examine the text of the FLSA itself.").

100. *Knepper*, 675 F.3d at 259 (quoting *Fisher v. Rite Aid Corp.*, 764 F. Supp. 2d 700, 705 (M.D. Pa. 2011)). The court acknowledged that there "was some concern [among legislators] that plaintiffs could be bound by a decision" without their knowledge or input. See *id.* at 260 (discussing Portal-to-Portal Act's legislative record); see also *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) ("It is clear that Congress labored to create an opt-in scheme when it created Section 216(b) specifically to alleviate the fear that absent individuals would not have their rights litigated without their input or knowledge.").

101. *Knepper*, 675 F.3d at 260. The court explained that historical evidence establishes the primary legislative purposes behind the Portal-to-Portal Act. See *id.* (discussing significance of legislative intent). The court also noted two divergent interpretations of "representative" action: whereas the Portal-to-Portal Act sought to prevent non-employee third parties from litigating the rights of others without their knowledge through "representative" actions, Rule 23 allows for "representative" actions only by interested members of the class whose rights are at issue. Compare *id.* at 260 n.15 (speculating that modern Rule 23 representative actions are more akin to concept of "collective" action endorsed in legislative history of Portal-to-Portal Act), with *Knepper v. Rite Aid Corp.*, 764 F. Supp. 2d 707, 714 (M.D. Pa. 2011) (equating opt-out actions with representative actions that Congress sought to limit with Portal-to-Portal Act amendments).

Furthermore, the court explained that the congressional intent behind the CAFA must also be balanced.<sup>102</sup> According to the court, the CAFA articulates a countervailing legislative goal of extending federal jurisdiction to all state law class actions that meet the statute's requirements.<sup>103</sup> Thus, without a clear textual mandate, federal jurisdiction otherwise contemplated by Congress under the CAFA should not be declined merely because it purportedly curtails another legislative goal.<sup>104</sup>

The court also revisited its decision in *De Asencio*—which Rite Aid argued supported application of inherent incompatibility—distinguishing it on two grounds.<sup>105</sup> First, the issue in *De Asencio* was one of supplemental jurisdiction, and the court declined jurisdiction because the complexity of the state claims at issue and the size of the state law class.<sup>106</sup> In contrast, the state law claims at issue in *Knepper* are substantively and factually similar to the FLSA claim.<sup>107</sup> More importantly, the court noted that, unlike

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102. See *Knepper*, 675 F.3d at 260–61 (rejecting assumption that legislative purpose behind Portal-to-Portal Act is only consideration relevant to evaluating inherent incompatibility inquiry).

103. See *id.* (arguing that courts should not invoke extratextual materials to decline jurisdiction otherwise authorized by statute).

104. See *id.* at 261 (noting that plaintiffs' satisfaction of CAFA jurisdictional requirements was not disputed by defendant or district court); see also 28 U.S.C. § 1332(a), (d) (2006) (establishing requirements for extending and declining federal jurisdiction over class actions).

105. See *Knepper*, 675 F.3d at 261 (clarifying *De Asencio*'s holding and scope); see also *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 313 (3d Cir. 2003) (reversing district court's exercise of supplemental jurisdiction over state law wage class action). For a discussion of *De Asencio*, see *supra* notes 49–55 and accompanying text; see also *Ervin v. OS Rest. Services, Inc.*, 632 F.3d 971, 980 (7th Cir. 2011) (distinguishing *De Asencio* as case involving complex state law issues); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761 (9th Cir. 2010) (discussing unique circumstances of *De Asencio*), *cert. granted, judgment vacated on other grounds*, 132 S. Ct. 74 (2011); *Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416, 424 (D.C. Cir. 2006) (characterizing *De Asencio* as involving more than mere procedural differences).

106. See *Knepper*, 675 F.3d at 261 (distinguishing *De Asencio* on jurisdictional and factual grounds); see also *De Asencio*, 342 F.3d at 308 (rejecting supplemental jurisdiction based on substantial predominance). The *De Asencio* court stated: "Here, the inordinate size of the state-law class, the different terms of proof required by the implied contract state-law claim, and the general federal interest in opt-in wage actions suggest the federal action is an appendage to the more comprehensive state action." *Id.* at 312; see also 28 U.S.C. § 1367(c) (authorizing federal courts to decline supplemental jurisdiction where state law claims substantially predominate federal issues forming basis for original jurisdiction). Under Section 1367(c), supplemental jurisdiction may be declined if:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

*Id.*

107. See *Knepper*, 675 F.3d at 261 (noting absence of complex or novel issues). Interestingly, the court did not address the size discrepancy between the state law

the supplemental jurisdiction in *De Asencio*, independent federal jurisdiction over the state class actions in *Knepper* existed under the CAFA, which provides no relevant basis for declining jurisdiction.<sup>108</sup>

The court next turned to Rite Aid's preemption argument, which it rejected succinctly.<sup>109</sup> In the court's view, a fatal flaw for the preemption argument was the fact that the conflicting classification procedures at issue were both provided by federal law.<sup>110</sup> Thus, because no other conflict existed between state and federal law, the court affirmed the district court's judgment that the FLSA does not preempt the relevant state laws.<sup>111</sup> Finally, the court also rejected Rite Aid's argument that classification under Rule 23 violates the Rules Enabling Act (REA) because it abridges the substantive rights of both employers and employees under the FLSA.<sup>112</sup> The REA argument assumes that FLSA Section 216(b) creates a substantive right for employers—to not be sued through representative action—and for plaintiffs—to not have their rights litigated without their knowledge or input.<sup>113</sup>

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and FLSA classes in *Knepper*. See *id.* (declining to discuss size discrepancy between classes).

108. See *id.* (clarifying difference between supplemental and CAFA jurisdiction).

109. See *id.* at 262–64 (characterizing preemption argument as recapitulation of inherent incompatibility argument and affirming district court's holding of no preemption); see also *Knepper v. Rite Aid Corp.*, 764 F. Supp. 2d 707, 712 (M.D. Pa. 2011) (holding that presence of savings clause indicates Congress intended FLSA standards to serve as mere regulatory floor).

110. See *Knepper*, 675 F.3d at 263 (ruling preemption “inapplicable” because “federal law cannot preempt another federal law” and because Portal-to-Portal Act of 1947 “cannot impliedly repeal” jurisdiction sweep of CAFA, which came long after).

111. See *id.* at 264 (affirming district court's judgment on preemption issue). The court explained that preemption was untenable because the state wage-and-hour laws at issue were not substantively in conflict with FLSA's virtually identical standards. See *id.* (rejecting “counterintuitive” argument that “enforcement of [state law] standards that are identical with [FLSA standards]” would present any obstacle to fulfillment of congressional purpose); see also Brief for the Sec'y of Labor as Amicus Curiae Supporting Plaintiff-Appellants at 9, *Knepper v. Rite Aid, Corp.*, 675 F.3d 249 (3d Cir. 2011) (Nos. 11–1684, 11–1685), 2011 WL 2603762, at \*9 (rejecting preemption argument).

112. See *Knepper*, 675 F.3d at 264–65 (rejecting argument that Rule 23's classification and preclusive effect abridges employers' substantive rights under FLSA not to be sued in representative actions, and plaintiffs' rights not to have their rights litigated without their knowledge or input). See generally Lopez, *supra* note 6 (examining REA argument against hybrid actions in light of plaintiffs' substantive rights and arguing that REA precludes hybrid actions as regulating more than merely procedure).

113. See *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 441 (W.D. Pa. 2007) (holding that Rule 23 violates REA by abridging substantive rights of employers and employees under FLSA). But see *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 164 (S.D.N.Y. 2008) (rejecting *Ellis* court's characterization of rights under FLSA).

### C. *Analyzing Knepper*

In *Knepper*, the Third Circuit became the fifth federal appeals court to reject inherent incompatibility, finding insufficient legislative and historical evidence to support the argument that Congress intended to eliminate opt-out classification for the FLSA.<sup>114</sup> It also held that the FLSA's purposes do not indicate any disapproval of opt-out class actions and that Rule 23 opt-outs were not yet extant at the time of passage.<sup>115</sup> On its face, the Third Circuit was correct that the FLSA includes no textual prohibition on using any federal procedures normally available to state law claims.<sup>116</sup> There is simply no indication from the statute that Congress intended to prevent state claims from going forward through Rule 23 classification; in fact, the presence of a "saving clause" lends credence to the argument because Congress clearly intended to support, rather than hinder, state wage-and-hour regulation.<sup>117</sup> Particularly where defendants voluntarily remove state law class actions to federal court, it seems fundamentally reasonable not to permit them to argue for dismissal on grounds of incompatibility with federal procedures.<sup>118</sup>

Nonetheless, the Third Circuit too quickly overlooked the fact that FLSA's opt-in requirement was specifically designed to prevent easy classification based on a policy of trying to limit so-called representative suits.<sup>119</sup> Hybrid claims employing a Rule 23 opt-out class clearly undermine this policy choice.<sup>120</sup> Nonetheless, the court was perhaps correct to leave resolution of this policy tension to the legislature, rather than creating a new jurisdictional doctrine out of whole cloth.<sup>121</sup>

### IV. IMPACT OF *KNEPPER*

*Knepper* likely marks the end of the inherent incompatibility doctrine because the Supreme Court is not likely to grant certiorari on this issue, given such a strong degree of uniformity among the circuit courts.<sup>122</sup> Ad-

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114. For a discussion of circuit court treatment of the inherent incompatibility doctrine, see *supra* notes 56–67 and accompanying text.

115. For a discussion of the Third Circuit's consideration of congressional purpose, see *supra* note 95 and accompanying text.

116. For a discussion of the text and policy of the Portal-to-Portal amendments, see *supra* notes 27–29 and accompanying text.

117. For a discussion of the Third Circuit's characterization of congressional purpose, see *supra* note 95 and accompanying text.

118. See Cholis, *supra* note 8, at 431 (discussing policy behind rejecting application of inherent incompatibility doctrine to bad faith defendants).

119. For a discussion of the policy behind the Portal-to-Portal amendments, see *supra* notes 27–29 and accompanying text.

120. For a discussion of the district court's policy analysis, see *supra* note 66 and accompanying text.

121. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (noting that policy decisions are best left to legislatures not courts).

122. See *Comeaux & Flesher*, *supra* note 7 (discussing possibility of Supreme Court grant of certiorari); see also *supra* notes 10–11 and accompanying text (dis-

ditionally, because the Third Circuit itself wrote the only circuit court opinion that offered support to the doctrine in *De Asencio*, the court's clear circumscribing of *De Asencio* in *Knepper* erects a significant barrier in front of the doctrine's proponents.<sup>123</sup> Thus, in both the Third Circuit and beyond, the *Knepper* holding offers encouragement to plaintiffs' lawyers considering hybrid wage-and-hour claims, which can be very powerful weapons for recovering unpaid wages.<sup>124</sup>

Given this legal reality, hybrid actions may become even more numerous in the coming years than they already have been in the past.<sup>125</sup> An increase in hybrid actions is likely to lead to significantly larger awards for plaintiff classes because of the combination of Rule 23's larger class sizes and the FLSA's more lenient classification standard, as well as the fact that employers will face penalties under state and federal law.<sup>126</sup> For this reason, plaintiffs' lawyers in Pennsylvania and throughout the Third Circuit should bring dual-filed state and federal class actions without worrying that the state claims might be dismissed by employer-friendly district courts.<sup>127</sup> When investigating other employment issues, such as discrimination, plaintiffs' lawyers should also inquire into wage-and-hour issues like overtime work, unpaid breaks, and misclassification of workers.<sup>128</sup>

As for defense lawyers and corporate counsel, the threat of these suits makes vigilant compliance with the FLSA and state wage regulations more important than ever.<sup>129</sup> This includes avoiding costly "misclassification" mistakes when applying overtime exemptions and fostering a corporate

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curring uniform rejection of inherent incompatibility doctrine among appeals courts).

123. For a discussion of the Third Circuit's handling of inherent incompatibility in *De Asencio*, see *supra* notes 50–56 and accompanying text.

124. See John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 903 (2005) ("A class action is perhaps the most powerful tool that plaintiffs can wield."); see also Cholis, *supra* note 8, at 430 (calling hybrid wage-and-hour claims powerful "double whammy" for plaintiffs).

125. See Cholis, *supra* note 8, at 430 (noting upward trend in number of wage-and-hour suits in federal courts).

126. See *id.* at 433 (explaining that defendants face increased liability because FLSA and state regulations each impose separate penalties); see also *Lizak v. Great Masonry, Inc.*, No. 08-C-1930, 2009 WL 3065396, at \*9–10 (N.D. Ill. Sept. 22, 2009) (allowing for recovery of damages under both FLSA and Illinois wage-and-hour laws); *Two-Headed Monsters: DOL Says Workers Should Be Able to Sue Under State, Federal Law at Same Time*, EMPLOYER'S GUIDE TO FAIR LAB. STANDARDS ACT NEWSL. (Thompson Publ'g Grp., Inc.), Mar. 2010 (describing hybrid actions as "two-headed monsters" that expose employers to increased liability).

127. For a discussion of the Pennsylvania district courts' treatment of the inherent incompatibility doctrine, see *supra* note 75 and accompanying text.

128. See Allen, *supra* note 2, at 2 (discussing effective practices among employment plaintiff lawyers).

129. See *id.* at 3 (discussing increased state law penalties, including liquidated damages in excess of wages owed for noncompliance with wage-and-hour regulations).

culture that reduces systematic miscalculation of wages.<sup>130</sup> If violations have already occurred, employers and their lawyers should focus on vigorously challenging classification under Rule 23's complex class action requirements, rather than attempting to re-litigate *Knepper* and the inherent incompatibility issue.<sup>131</sup>

## V. CONCLUSION

For several years, the inherent incompatibility doctrine appeared to be a promising strategy for attorneys fending off hybrid wage-and-hour claims, but the doctrine now appears to be circling the drain.<sup>132</sup> *Knepper* conclusively resolved the question against inherent incompatibility in cases where federal courts have original CAFA jurisdiction over state wage-and-hour law claims.<sup>133</sup> However, in hybrid actions that do not meet the CAFA's diversity requirements, the question of inherent incompatibility remains technically unsettled.<sup>134</sup> Nonetheless, the increased applicability of the CAFA renders this narrow issue increasingly irrelevant.<sup>135</sup> Furthermore, even in such narrow cases, the doctrine's treatment in other circuit courts does not bode well for employers defending against these actions.<sup>136</sup> Thus, employers and their attorneys need to search for other innovative strategies to stem the rising tide of group wage-and-hour litigation.

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130. See *id.* at 5 (discussing need for organization-wide training to avoid susceptibility, particularly among small businesses, to systematic failures to pay wages due under statute).

131. See Cholis, *supra* note 8, at 433 (discussing futility of employers in Seventh Circuit relying on inherent incompatibility doctrine after *Ervin*).

132. See Schneider & Willson, *supra* note 6, at \*7 (noting substantial authority on both sides of inherent incompatibility argument).

133. See Jason E. Reisman, *There Goes the Neighborhood—Third Circuit Decides FLSA “Opt-In” Collective Actions and State Law “Opt-Out” Class Actions Can Exist in the Same Lawsuit*, WAGE & HOUR DEF. INST. (Apr. 12, 2012), <http://wagehourdefense.wordpress.com/2012/04/12/there-goes-the/> (calling *Knepper* holding “fatal blow” to employers defending against hybrid actions).

134. See Cholis, *supra* note 8, at 444 (“If the appellate circuits are to become as divided as district courts, combined actions may soon warrant review by this nation’s highest court.”).

135. For a discussion of the CAFA’s jurisdictional sweep and underlying policy objectives, see *supra* notes 46–48 and accompanying text.

136. For a discussion of the negative treatment of the inherent incompatibility doctrine at the appellate level, see *supra* notes 57–67 and accompanying text.

